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No. 99-1049

IN THE
Supreme Court of the United States

DATALECT COMPUTER SERVICES, LTD.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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The Brief in Opposition, far from rebutting the arguments made in the petition, graphically demonstrates why the Court should grant certiorari in this case.

1. In the petition, we showed that this case would have come out differently under the standards applied by the Fourth, Seventh, and Eighth Circuits. Pet. 16-17. The government conspicuously fails to take issue with us on this point. The Brief in Opposition does not even mention, let alone distinguish, those circuits' decisions.

We also showed (Pet. 17-18) that the decision below is not an isolated incident but reflects a consistent pattern in the Federal Circuit of requiring specificity from plaintiffs seeking to prove the amount of damages in government contract actions. The Brief in Opposition confirms that this is the settled practice of the Federal Circuit. Br. in Op. 4-5 (citing Federal Circuit cases).

2. The government defends this practice, and the decision below, by asserting that they rest on the principle that

"contract law precludes recovery for speculative damages." Br. in Op. 4. We have no quarrel with that principle, but the government's assertion that this case involves that principle is completely wrong. As this Court has explained, "the rule that precludes the recovery of uncertain and speculative damages * * * applies only to situations where the fact of damage is itself uncertain." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). It does not apply when "[t]he uncertainty lies only in the amount of damages" (*ibid.*).

In this case, "the fact of damage" is not at all uncertain. The trial court explicitly found that "plaintiff incurred monetary injury as a result of defendant's faulty estimate." Pet. App. 34a. The court of appeals did not question that finding. In this case "[t]he uncertainty lies only in the amount of damages" (*Anderson*, 328 U.S. at 688). The "speculative damages" principle therefore has no application whatever. The Court has drawn this very distinction—between uncertainty over whether the defendant's wrong injured the plaintiff, and uncertainty over the precise amount of the injury—repeatedly. The "speculative damages" rule precludes recovery only in the former category of cases. See Pet. 12, citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561 (1941); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

3. Apart from its miscitation of the "speculative damages" rule, the government simply makes no argument in support of the Federal Circuit's practice of requiring plaintiffs in government contract cases to prove the amount of their damages with more specificity than is required elsewhere in the law. Instead, the government blithely asserts that "other legal contexts * * * present a variety of different considerations in proving damages." Br. in Op. 5 n.2. But as we demonstrated in the petition, in *every* "other

legal context," a plaintiff who has established that it was damaged by a wrong does not have the burden of proving the specific amount of damages. The government points to nothing—no statutory provision, no decision of this Court, no policy argument—to support what it acknowledges to be the Federal Circuit's practice of treating this area of law differently from all others.

4. The government also makes the rote assertion that review should be denied because there will be further proceedings in this case on remand. Br. in Op. 8 n.5. Deferring resolution of the issue we present would serve no useful purpose and can only result in the pointless waste of judicial resources. The proceedings on remand cannot moot the issue presented here; if the government prevails on remand, the issue we now present will come before this Court in the identical posture. If Datalect prevails on remand, the trial court will be forced to compute damages without the benefit of guidance from this Court—and then to redo that computation should this Court ultimately agree with our submission.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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